From: David Burgess
To: Renata Hesse
Date: 1/28/02 11:40am
Subject: Microsoft Settlement

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Ms. Renata B. Hesse, Esq.
Antitrust Division U.S. Department of Justice
601 D Street, N.W.
Washington, D.C. 20530-0001

January 27, 2002

Dear Ms. Hesse:

Re: Proposed Final Judgment (Microsoft Antitrust Case)

I am writing to submit my comments on the Revised Proposed Final Judgment in the civil antitrust case, United States of America vs. Microsoft Corp. I have read the Revised Proposed Final Judgment, the Complaint and Stipulation in the case, as well as the Competitive Impact Statement, and other documents and decisions related to this case. I urge the Department of Justice to settle this case on the proposed terms of settlement, and urge the Court to accept this settlement as being fair, reasonable, enforceable, and in the public interest.

Public Interest Is Served

I am one of those consumers whose interests are so frequently cited when antitrust and other laws are invoked, but whose actual opinions are so seldom sought or considered by litigants and commercial interests. I am not affiliated with Microsoft or any of its lines of business. Nor am I affiliated with any of Microsoft's competitors, although I have been solicited by some of them to oppose this proposed settlement. I write on my own behalf, and not as part of any organized so-called "grass-roots" lobbying campaign. Having followed this case in the media for several years, and having reviewed the voluminous documents on this case available on the DOJ website, I suspect that I will be among a very few individual consumers who are submitting their own comments on this proposed settlement, rather than repeating the conflicting claims, or advocating the commercial interests, of clients, competitors, employers, etc.

Public Interest In Ending Costly Litigation

The proposed final judgment and settlement is fair and reasonable because it brings an end to a lengthy and costly antitrust action (perhaps the longest and costliest ever), and does so in a way that is enforceable. I urge the court to consider that the public's (and the taxpayers') interests can be served quite effectively when the DOJ and private concerns agree to settle expensive litigation in a reasonable manner.

Fortunately, we do not allow only commercial interests to balance the costs of proceeding against the risks of an uncertain case. The concept behind settling uncertain --but certainly costly-- litigation is just as valid when the government is a party, as when the dispute is between two businesses. (And public interests can additionally be served later by alternative use of taxpayers' funds that otherwise would disappear in continuing costly litigation.)

Settlement Recognizes Technology and Velocity of Change

The proposed settlement is also reasonable because it takes into account the velocity of change and innovation in the relevant technology markets. In fact, from the consumer's perspective, the relevant markets change literally every day, with each new innovation and technical improvement. This volume and velocity of change affects OEMs, computer operating and communications systems, routing and networking approaches, and internet applications, portal, service and content providers (ISPs, ICPs, OLSPs, etc.), as well as their ancillary software, middleware, related hardware, and integrated (or isolated) features. Despite the claims of some manufacturers and service providers, there is enormous intellectual competition in these markets ?and those making claims that innovation has been stifled know that is false: they know that this competition exists, and they themselves benefit from it every day.

Opposition to this proposed settlement seems to be as much an effort to punish Microsoft for the fact that the marketplace has changed, as it is an effort to seek redress for Microsoft's wrongdoing.

Personally, like millions of others, I use a broad variety of products and services

that would be covered by the proposed settlement. I regularly use internet browsers manufactured by Netscape and by Microsoft; I have used e-mail accounts through both AOL and MSN; everyday I consult a wide variety of ICPs, use the MS operating systems, and also use Sun's products and services. My middleware and invisible software applications are equally intermixed. Through mutual funds I am probably invested in Microsoft, Netscape, Sun, AOL, and countless other corporations whose commercial prospects will be affected by this settlement, and by the changes in the market. This constant and extensive intermingling of technology and economic interest represents the power and reason of the marketplace, and of the millions of consumers who demonstrate daily that competition still remains vibrant amidst rapidly changing technologies.

Settlement Imposes Reasonable Penalties

As to alleged injuries from Microsoft's marketing and manufacturing conduct, I have not noticed or suffered from the alleged predations of Microsoft, but don't doubt that some have. At the same time, It is evident that the primary interests opposing this proposed settlement today are those who seek to hold back the oceans and thus to stop the tides. No amount of litigation or monetary damages can make a non-competitive product innovative. That product might still be worthwhile to someone if it is cheap enough; but it will ultimately be left behind by every fast-changing market. Even cheap buggy whips have no meaningful market, not matter how well-made they are, nor how committed or celebrated their designers and manufacturers may be.

On the other hand, excessive litigation costs can easily make an innovative product too costly for consumers to use. Increasing the cost of a Ford's Model A by layering on litigation and legal expenses could have delayed the day when the automobile would replace the horse and buggy, but it would have done little to advance the public's ultimate interests. No amount of subsidy or economic penalty can prevent the marketplace from adopting or rejecting technological changes on their own merits. Moreover, I don't believe that the purposes of the Clayton and Sherman Acts would be served at all by creating expensive impediments to systems integration and innovation, merely to preserve a market share for alternative systems that marketplace forces (i.e., we consumers) have already rejected as lesser products or services.

Settlement Proposes Enforceable Remedies

Finally, the proposed settlement and judgment are appropriate because they are enforceable. They are forward looking remedies, which do take account of the nature of the relevant technology markets. The settlement does recognize that unlawful behavior should be stopped, and that recompense should be demanded and paid in a way that advances the public's interests. But it does not confuse those worthy objectives with the cries of other OEMs, ISPs, ICP, etc. for commercial subsidies, dressed up as their claims of unremitting anti-competitive behavior. The proposed remedies do impose a new cost on Microsoft, and therefore will plainly benefit Netscape, AOL, CompuServe, Sun, etc. But the costs will benefit consumers and the public more directly. The business limitations and restraints that the settlement imposes on Microsoft will similarly benefit the public ?in an enforceable way? by assuring continued competition AND allowing continued innovation and integration.

Limitations on Microsoft's business practices will also benefit Microsoft's competition ?but only to the extent that that they themselves are competitive. The proposed settlement does not attempt to create a new competitor where it does not exist , nor does it attempt to prop up a non-competitive business that wishes to, but finds it cannot, actually compete with Microsoft or any other firm.

All in all, I believe that the Court should accept the Revised, Proposed Final Judgment and Settlement of this unique anti-trust case as being in the public interest.

Sincerely yours,

David Burgess
Arlington, VA 22201-1037

Note: I have also enclosed these comments as TEXT and WORD attachments for your convenience.

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